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In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*;
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* THE STATE OF NORTH CAROLINA IN SUPPORT OF CROSS-RESPONDENTS

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BRIEF OF *AMICUS CURIAE* THE STATE OF NORTH CAROLINA IN SUPPORT OF CROSS-RESPONDENTS

The State of North Carolina, as *amicus curiae*, respectfully submits this brief in support of the Cross-Respondent, Carol M. Browner, Administrator of the United States Environmental Protection Agency ("EPA"). North Carolina urges reversal of the decision of the court below, *American Trucking Ass'ns, Inc. ("ATA") v. United States Envtl. Protection Agency*, 175 F.3d 1027, *reh'g granted in part and reh'g en banc denied*, 195 F.3d 4 (CADC 1999), to allow EPA to enforce its revised primary National Ambient Air Quality Standard ("NAAQS") for ozone ("the eight hour standard") which requires states to reduce ambient levels of ozone to 0.08 parts per million ("ppm"). National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. Part 50).

INTEREST OF THE *AMICUS*

A. THE STATE PLAYS A PRIMARY ROLE IN THE PROTECTION OF ITS NATURAL RESOURCES AND THE HEALTH OF ITS CITIZENS

Every state retains a quasi-sovereign interest in its natural resources, including the air within its borders. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S. Ct. 618, 619, 51 L. Ed. 1038 (1907). Thus, a state may regulate activities that threaten to degrade its air quality to such a level that the health and welfare of its citizens are negatively affected. Although there now exists in the Clean Air Act a federal mandate to the states to maintain minimum levels of air quality, the Act retains, through the use of State Implementation Plans ("SIPs"), the states' pre-eminent role in air pollution abatement. *Hancock v. Train*, 426 U.S. 167, 169-70, 96 S. Ct. 2006, 2008, 48 L. Ed. 2d 555 (1976). The Clean Air Act itself recognizes that "air pollution control at its source is the primary responsibility of States and local governments...." 42 U.S.C. § 7401(a)(3).

The police power provides the state with authority to regulate for the protection of the health and welfare of its citizens. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 815, 4 L. Ed. 2d 852 (1960) (police power encompasses regulation of air pollution). With regard to those members of society that require special consideration, such as the mentally and physically impaired, the interest of the state is heightened. "That the State has a proper interest in providing care and assistance to the unfortunate goes without saying." *O'Connor v. Donaldson*,

422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975).

North Carolina is acutely aware of its responsibilities regarding air quality and public health. Due in part to its explosive growth over the past two decades, the State currently faces vexing ozone pollution problems that endanger the health of its sensitive citizens in urban areas across the State, and threaten some of its most valuable natural resources. For example, in 1999, the State experienced 68 days of unhealthy ozone levels -- the fifth highest total in the country. *See* N.C. Div. of Air Quality, *Eight-Hour Ozone Averages in NC in 1999*, at 29 (1999). In 1998, six of the State's urban areas experienced at least ten exceedances of the eight hour standard at issue in this case. Memorandum from A. Dennis McBride, State Health Director, to Bill Holman, N.C. Sec'y of Envt. & Natural Resources, at 1 (Aug. 10, 2000)

North Carolina's State Health Director recently reported that during the 1997 high ozone season elevated ozone levels caused up to 4.6% (1,900 incidents) of the total respiratory related hospital admissions in the State. This represents more than twice the percentage (2.12%) attributed to ozone over the same period in the thirty-seven eastern states. Estimates of the cost of treating just these ozone-related hospital admissions range from $9,000,000 to $19,000,000. Further, high ozone levels were linked to 5,700 emergency room visits, and 240,000 asthma attacks in North Carolina during the ozone season. *Id.* at 1-2; *see also* Memorandum from Luanne K. Williams *et al.*, N.C. Dept. of Health & Human Services, to Alan Klimek, N.C. Div. of Air Quality (Jan. 11, 2000).

To alleviate these health problems and in furtherance of its role as protector of its sovereign resources, the State of North Carolina has adopted regulations to begin voluntarily implementing the eight hour ozone standard that is before this Court. *See* 15A N.C.A.C. § 2D.0405.

B. The State Has A Particular Interest In The Protection Of The Health Of Children In The State

Historically, the state has played an important role in the protection of one of its most valuable assets -- children. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 113, 115 S. Ct. 2038, 2061, 132 L. Ed. 2d 63 (1995) (O'Connor, J., concurring) (noting states' historical sovereignty and "claim by right of history and expertise" in field of education). No state has taken this role more seriously in recent years than North Carolina. The *amicus* submits that it vigorously safeguards the health of the children of its citizens and has a substantial interest in reducing ozone pollution in order to protect this particularly sensitive segment of the population.

Under the state's obligation as *parens patriae*, it seeks to protect the health and welfare of minors when the minor's parents or guardian are unable to adequately perform that task. *E.g., Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (upholding involuntary termination of parental rights at request of North Carolina locality); *see also Troxel v. Granville*, 120 S. Ct. 2054, 2072, 147 L. Ed. 2d 49 (2000) (Stevens, J., dissenting) (noting, with regard to children, states' "long-recognized interests as *parens patriae*"). In furtherance of and to

complement this role, the *amicus* regulates schools, day care centers, and foster homes to assist parents in the upbringing of children. In particular, education is of the highest priority in North Carolina, and regular attendance is critical to a child's success in school. Individual school boards maintain some flexibility over the school calendar, but the State requires each public school to provide 180 days and 1,000 hours of instruction for enrolled children. N.C.G.S. § 115C-84.2. Attendance is mandatory. *Id.* § 115C-378. Although nonattendance for health reasons is considered an excusable absence, repeated absence for any reason is detrimental to any child's academic and social development. The State plainly cannot mandate attendance in school yet sit idly by while avoidable health problems, such as those attributable to high concentrations of ground-level ozone, lead to absenteeism.

Children must also be afforded the rich outdoor experiences that are vital to a child's development. Although the State allows for local control over the physical layout of elementary and secondary schools, the Department of Public Instruction provides detailed guidelines for the selection of sites for such schools and the planning of school facilities. These guidelines recommend that the usable area of any school grounds be large enough to accommodate outdoor instruction and recreation, and provide very specific guidance regarding the improvement of outdoor areas for these important purposes. *See* N.C. Dept. of Public Instruction *et al.*, *Land for Learning* (June 1998).

The State is even more insistent that children are afforded ample opportunity for outdoor experience at facilities that it

regulates directly. The State requires licensed day care facilities to reserve a certain area for outdoor activities and to allow each child the opportunity for outdoor activity. N.C.G.S. § 110-91; 10 N.C.A.C. §§ 3U.0509, .0511, .0601, .1402, .2504, .2508. The State further mandates provision of outdoor activity space by developmental day services for children with or at risk for developmental challenges, foster homes, and residential child care facilities. 10 N.C.A.C. §§ 14V.2204, .2404, 41F.0703, 41S.0609.

North Carolina, having aggressively exercised its regulatory obligation to protect the physical and mental health of the children of its citizens, retains a significant interest in the abatement of ground-level ozone pollution, particularly as it impacts children.

SUMMARY OF ARGUMENT

The expansive record produced by EPA in this case clearly supports EPA's decision to revise the ozone NAAQS. Current data show that tropospheric ozone at any level has adverse health effects. Therefore, EPA has revised the averaging period from one to eight hours to provide a more comprehensive standard. The concentration level has been lowered from 0.12 ppm to 0.08 ppm to reduce the incidence of adverse health effects. EPA updated the measurement of the NAAQS to a concentration-based form to take into consideration the magnitude and not just the number of violations of the ambient standard. These amendments to the NAAQS will result in significant and necessary improvements in the physical health of children, other sensitive populations, and the general population.

The benefits to youths are of special concern to the State because illnesses to children may result in developmental setbacks. For example, increased ground-level ozone may force a child to miss school more often. In addition, ozone-related health problems may deter a child from outdoor activities that present significant opportunities for social and physical development.

To realize these health benefits, the eight hour standard established by EPA must be enforced nationwide. Any state may, as North Carolina intends, implement the eight hour standard under state law. But increased costs to industry and consumers attend such a program, creating an economic disadvantage for states implementing the more protective standard. Also, the migratory nature of air pollutants places at risk any state's efforts to attain the standard. Ozone precursors imported from other states can overwhelm local efforts to curtail ozone pollution, such as may be occurring in the western North Carolina section of the Great Smoky Mountains National Park.

ARGUMENT

The *amicus* supports and endorses the views expressed by its sister states presented in *amicus curiae* briefs by New York *et al.* in the companion case, *Browner v. ATA*, No. 99-1257, and by California *et al.* in this case. North Carolina writes separately to bring to the Court's attention the health benefits of the eight hour standard and the need for a national standard to achieve these benefits.

This brief will focus in large measure on the adverse impacts of tropospheric ozone on children's health. The *amicus* does not intend to imply that this is the only group that will benefit from the eight hour standard. Indeed, the entire population will face fewer health risks under the more stringent standard. *E.g.*, 62 Fed. Reg. at 38,864/3 (suggesting that reductions in hospital admissions for respiratory causes will occur as the ambient ozone concentration level is reduced). Asthmatics will gain particularly, *e.g.*, *id.* at 38,864/2 (exposure to ozone may exacerbate asthma), as may the elderly and those who work or exercise regularly outdoors. The attention given children herein is merely to illustrate the impacts of ground-level ozone on one sensitive population.

I. THE EIGHT HOUR STANDARD IS REQUIRED TO BEST PROTECT THE PHYSICAL HEALTH OF CHILDREN

EPA's data show that ground-level, or tropospheric, ozone is a "non-threshold" pollutant, because no minimum level of ozone has been identified under which health effects become negligible. Simply put, the less ozone humans inhale, the less often adverse health impacts will occur and the less severe those impacts will be. *See ATA*, 125 F.3d at 1034. The question thus becomes, at what ozone standard does the health risk become acceptable? *See* 62 Fed. Reg. at 38,863/3.

The revised ozone NAAQS consists of three elements: the averaging period (eight hours), the ambient concentration level (0.08 ppm) and the form (fourth highest measurement over averaging period not to exceed level). EPA studied each element exhaustively and selected an appropriate standard from

a limited range of options. The *amicus* supports EPA's selection of the eight hour standard as a legally permissible implementation of the Clean Air Act. This significant improvement in air quality is a necessary step in the evolution of the safeguarding of juvenile health in the face of scientific uncertainty.

The eight hour averaging time better protects the health of children than the one hour averaging time under the current ozone NAAQS. First, the eight hour averaging standard is more comprehensive, as it acts to suppress ozone levels over a longer period of time. The Clean Air Scientific Advisory Council ("CASAC") plainly concluded that the "8-hour standard [is] more appropriate for a human health-based standard than a 1-hour standard." 62 Fed. Reg. at 38,861/3. Second, scientific evidence that was not available when EPA last reviewed the ozone NAAQS now demonstrates that adverse health consequences occur at ozone concentrations lower than the current 0.12 ppm standard when that concentration is experienced over an eight hour period. *Id.* at 38,861/2.

The *amicus* further submits that the EPA's selection of a concentration level of 0.08 ppm was appropriate. Although evidence now supports the existence of adverse health effects at levels below the current 0.12 ppm standard, a level of 0.09 ppm coupled with an eight hour averaging period represents a marginal if any improvement over the current standard. *Id.* at 38,864/2. Implementation of a 0.08 ppm ozone level would eliminate hundreds of thousands of occurrences in children of

adverse ozone reactions in EPA's limited study area alone.[1] *Id.* at 38,864/3. EPA would be abdicating its duty to "protect the public health," 42 U.S.C. § 7409(b)(1), if it simply ignored this data rather than promulgating at least the incremental improvement represented by the eight hour standard.

Estimates of average naturally occurring background levels of ozone range from 0.02 ppm to 0.05 ppm. U.S. Envtl. Protection Agency, *Air Quality Criteria for Ozone and Related Photochemical Oxidants*, at § 1.4 (1996). A concentration level of 0.07 ppm measured over eight hours approaches the levels that occur naturally, albeit infrequently, in some areas. 62 Fed. Reg. at 38,868/3. Thus, there is no merit to the argument that in order to protect the public health, EPA must set the NAAQS for a non-threshold pollutant at zero. *See ATA*, 175 F.3d at 1034. Such a standard implies that Congress intended that naturally occurring tropospheric ozone be cleansed entirely from the air, which is absurd.

The third and final element of the NAAQS is the "form." "Taken together, the level and form of the standard, for a given averaging time, determine the degree of public health protection afforded by the standard." 62 Fed. Reg. at 38,863/2. The current one hour standard uses an exceedance-based form, under which attainment is measured by the number of days on which ozone levels exceed the ambient standard. The concentration-based form that EPA seeks to adopt assesses

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[1] The EPA's study area included nine urban areas in which approximately 3.1 million "outdoor children" lived. 62 Fed. Reg. at 38,865/2 n.15

compliance by averaging each of the annual fourth highest ozone concentration levels for three consecutive years. Unlike the exceedance-based form, the concentration-based form more appropriately considers the magnitude of each violation, and not just the number of violations. EPA found that the concentration-based form also provides greater stability from year to year. *Id.* at 38,869/2-3.

The *amicus* agrees with EPA that the impacts to children under the one hour standard are substantial and should be reduced. In supporting adoption of the eight hour standard, the North Carolina State Health Director concluded, as did CASAC, that the one hour standard provided little or no margin of public safety, especially for sensitive populations, such as children. Memorandum from McBride, *supra*, at 2; 62 Fed. Reg. at 38,863/3; *see also* 42 U.S.C. § 7409(b)(1) (requiring NAAQS to be established to allow "an adequate margin of safety").

II. GROUND-LEVEL OZONE IS DETRIMENTAL TO CHILD DEVELOPMENT

"Outdoor children" are at particular risk from the effects of ground-level ozone. This population includes children between the ages of six and eighteen years of age who are active outdoors, and represents thirty to forty-five percent of the entire population of children. 62 Fed. Reg. at 38,860/3 n.7. "Outdoor children" with asthma are at an even greater risk.

Even at the 0.08 ppm standard, just under one in every one hundred outdoor children will experience moderate to severe pain when breathing deeply at least once annually. Each child

that experiences this symptom will average nearly 4.5 such occurrences each year. *Id.* at 38,865/3. This certainly will impact that child's ability to attend school, and his or her ability to participate in outdoor recreation and instruction.

Numerous studies have detailed the importance of physical activity in human development. The American Academy of Pediatrics ("AAP") notes the following potential benefits of physical activity in children: preventing high blood pressure, strengthening bones, warding off heart disease and other medical problems, developing a habit of physical activity that carries into adulthood, and maintaining or achieving proper weight. The AAP also cites as a major benefit of physical activity in children and young adults the relief of stress related to family problems, social conflicts and school pressures. American Acad. of Pediatrics, *Better Health & Fitness Through Physical Activity* (No. HE0090 1996). Furthermore, participation in team sports assists the development of the ability to work with others and good sportsmanship. *See Land for Learning*, *supra*, at 39.

The psychological and emotional benefits of physical activity for minors are well-documented. To further these benefits children should be offered a wide range of activities, including a wealth of outdoor activities, to ensure that each child finds suitable interests. Any deterrent to these pursuits should be reasonably reduced. Ozone pollution can substantially impact sensitive children, especially the increasing numbers of those with asthma, and hinder their participation in vital physical activity.

In the interest of taking every reasonable step to promote the physical and mental well-being of children, the *amicus* contends that the eight hour ozone standard is necessary to ensure that children's academic, physical, and social development are not hindered by the adverse effects of tropospheric ozone.

III. A NATIONAL STANDARD IS ESSENTIAL TO ACHIEVE THE PUBLIC HEALTH OBJECTIVE AND TO ENSURE A LEVEL ECONOMIC PLAYING FIELD

North Carolina has voluntarily adopted the eight hour standard, and is proceeding to implement it. But it is only one of two states to take this step.[2] The *amicus* applauds the adoption by EPA of a national standard that adequately protects public health, but suggests that absent uniform enforcement of the standard, which is substantially inhibited by the Court of Appeals decision, North Carolina's efforts might not yield the projected health benefits and in the process will subject the State's industry and consumers to an unfair financial burden.

Compliance with the eight hour standard will save the State and its citizens and businesses millions of dollars from, for example, worker-hours that are not lost and crops that are not damaged. But, of course, ozone pollution knows no political boundaries. Even North Carolina's best efforts alone do not guarantee the safety and health of its population, and

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[2] Delaware also has promulgated the eight hour standard. *See* Del. Admin. Code 70-100-003 § 6.2.

will not result in these projected economic benefits if sources in nearby states are not subject to equally stringent controls.

The interstate ozone transport problem is directly observable in the Great Smoky Mountains, which are home to the Great Smoky Mountains National Park. The park -- truly a national treasure -- is the most visited national park with over nine million visitors annually. But in 1998, ozone levels in the park exceeded the eight hour standard on 44 days -- the most of any national park for that year. The park also recorded 52 days of exceedances in 1999 and 22 so far this year.[3] Ground-level ozone hampers physical activity in the park and degrades vegetation. North Carolina has proposed that the area be designated nonattainment under the eight hour standard.[4]

Ozone violations in the North Carolina mountains result not only from sources within the State, but also from ozone precursors that originate as near as Tennessee and as far away as Illinois and Louisiana. North Carolina's adoption of the eight hour standard will not affect these foreign sources and will not sufficiently reduce ozone levels in the mountains. Moreover, the lack of an enforceable national eight hour standard will deprive the State of the remedy Congress made available under section 126 for interstate pollution abatement.

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[3] As of August 18.

[4] The National Park itself is a Federal Class I Area that will receive some special protection under the EPA's recently promulgated Regional Haze Regulations. *See* 40 C.F.R. Part 51. But other areas of the State's vast mountains suffer from similar ozone maladies and are protected only by the usual Clean Air Act tools and the State's own efforts.

See 42 U.S.C. § 7426. A national standard is needed to address this problem.

The State is gravely concerned that its leading role in the protection of public health will negatively impact its economic growth relative to its sister states. In order to comply with the eight hour standard North Carolina will seek reductions in ozone precursors from both stationary and mobile sources. State regulators expect substantial reductions in NO_x[5] emissions from compliance with Title IV of the Clean Air Act and the recent SIP revisions ordered by the EPA. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (codified at 40 C.F.R. Parts 51, 72, 75 & 96) ("NO_x SIP Call"). However, the State anticipates that these reductions will not be sufficient to achieve compliance with the eight hour standard. Thus, North Carolina's ozone plan ultimately will require additional controls on individual stationary sources, mostly in and near metropolitan areas, which controls are more stringent than those required by the NO_x SIP Call.[6] Although the extent of these controls has yet to

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[5] Oxides of nitrogen, or NO_x, are chemical precursors of ozone and reductions in emissions of NO_x result in reduced tropospheric ozone levels.

[6] Through the NO_x SIP Call, EPA has required 22 eastern states to impose controls on sources of NO_x that "contribute significantly to nonattainment in, or interfere with maintenance by" other states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). North Carolina joined several states in challenging this rule. *See Michigan v. United States Envtl. Protection Agency*, 213 F.3d 663 (CADC 2000). North Carolina believes that interstate transport of NO_x

(continued...)

be determined, the plan assuredly will result in increased costs to industry that will be passed on at least in part to small businesses and consumers.

The North Carolina General Assembly last year enacted the Ambient Air Quality Improvement Act of 1999 to expand the vehicle inspection and maintenance program to nearly half of all the counties in the State by 2006. *See* 1999 N.C. Sess. Laws 328, Part III (codified in part at N.C.G.S. § 143-215.107A(c)). The program was refined in 2000 to allow for the use of onboard diagnostic equipment. *See* 2000 N.C. Sess. Laws 134, § 8 (to be codified at N.C.G.S. § 20-183.3). It is expected that the incremental cost to consumers of the inspection alone will exceed $35,000,000, at an average cost of $13.30 per vehicle per year. This figure does not include repair costs to the consumer resulting from the detection of emissions equipment failures. In addition, North Carolina will seek EPA's approval to reduce the sulfur content of gasoline two years prior to the national deadline. 1999 N.C. Sess. Laws 328, Part II (codified in part at N.C.G.S. § 119-26.2) (setting 2004 as deadline); 40 C.F.R. § 80.195; 42 U.S.C. § 7545(c)(4)(C) (providing exemption from pre-emption). The cost to consumers over those two years will be just short of $100,000,000.

A national ambient ozone standard that protects the public from the health risks evidenced in the record would alleviate

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[6] (...continued)
is a serious threat to public health and national standards are required to abate this problem. The State disagrees only with EPA's approach to the matter, and not EPA's goal of reducing tropospheric ozone levels.

the disparate economic consequences to states such as North Carolina that choose to implement the eight hour standard.

CONCLUSION

For all of the foregoing reasons, the *amicus* respectfully requests that this Court reverse the decision of the Circuit Court.

Respectfully submitted,

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